No. 17-387

IN THE
SUPREME COURT OF THE UNITED STATES

UPPER SKAGIT INDIAN TRIBE,

Petitioner,

v.

SHARLINE LUNDGREN AND RAY LUNDGREN,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

BRIEF FOR THE PETITIONER

Arthur W. Harrigan, Jr.
Counsel of Record
Tyler L. Farmer
Kristin E. Ballinger
John C. Burzynski
Harrigan Leyh Farmer
& Thomsen LLP
999 Third Ave., Suite 4400
Seattle, WA 98104
(206) 623-1700
arthurh@harriganleyh.com

David S. Hawkins
General Counsel
Upper Skagit Indian Tribe
25944 Community Pl. Way
Sedro-Woolley, WA 98284
(360) 854-7016
dhawkins@upperskagit.com

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QUESTION PRESENTED

Does a court's exercise of *in rem* jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is the Upper Skagit Indian Tribe, a federally recognized Indian tribe. Petitioner was the defendant and appellant below. Respondents are Sharline and Ray Lundgren, who were the plaintiffs and respondents below.

There are no parent or publicly-held corporations involved in the proceeding.

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INTRODUCTION

Petitioner Upper Skagit Indian Tribe (the Tribe) purchased 39.56 acres of its ancestral land in Skagit County, Washington, by statutory warranty deed in 2013. Respondents Sharline and Ray Lundgren own adjacent land to the south of the Tribe's land. In 2015, the Lundgrens brought a quiet title action in Washington State court, arguing they are entitled to a portion of the Tribe's land by adverse possession. The Tribe invoked its sovereign immunity from suit and moved to dismiss the action.

This Court has repeatedly affirmed the importance and inviolability of tribal sovereign immunity from suit, and has recognized two, and only two, exceptions: waiver of the immunity by the tribe and abrogation of the immunity by Congress. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030–31 (2014).

Contrary to controlling precedent in this Court and despite the Upper Skagit Indian Tribe's invocation of its sovereign immunity from suit, the courts below permitted the Lundgrens' quiet title action to proceed based on the *in rem* nature of Washington State quiet title actions where there was neither a waiver nor congressional abrogation of sovereign immunity.

The Washington Supreme Court's ruling is based on what would amount to a third exception to tribal sovereign immunity for actions brought *in rem* against land owned by a federally recognized Indian

tribe. No such exception exists. The ruling cannot stand against controlling rulings of this Court. If affirmed, the decision would undermine the autonomy, territorial integrity, and resources of Indian tribes throughout the nation.

OPINIONS BELOW

The opinion of the Washington Supreme Court that is the subject of this appeal is reported at *Lundgren v. Upper Skagit Indian Tribe*, 389 P.3d 569 (Wash. 2017), and reproduced at Joint Appendix 98–134. The order of the Washington Supreme Court amending its opinion is unreported but reproduced at Joint Appendix 135–138. The order of the Washington Supreme Court denying the motion for reconsideration is unreported but reproduced at Joint Appendix 139.

The opinion of the Washington Superior Court denying the Upper Skagit Indian Tribe's motion to dismiss is unreported but reproduced at Joint Appendix 75–76.

JURISDICTION

The Washington Supreme Court issued its decision on February 16, 2017, amended the decision on June 8, 2017, and denied reconsideration on June 12, 2017. The Upper Skagit Indian Tribe filed a petition for a writ of certiorari on September 11, 2017, and this Court granted the petition on December 8, 2017.

The Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

RULES INVOLVED

Washington's Superior Court Civil Rules governing joinder of necessary parties provide in relevant part:

> **Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest

relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and the person's joinder would render the venue of the action improper, the joined party shall be dismissed from the action.

Washington Civil Rule 19(a) (2017).

Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective

> provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Washington Civil Rule 19(b) (2017).

STATEMENT

1. In 1855, the predecessor aboriginal bands of the Upper Skagit Indian Tribe and the United States of America entered into the Treaty of Point Elliott. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661–62, 661 n.1, 662 n.2 (1979). By doing so, the United States recognized the Tribe as a sovereign and secured title to the lands the Tribe held in the Pacific Northwest. *See id.*

2. One hundred and fifty-eight years later, in 2013, the Tribe bought property in Skagit County, Washington, and received a statutory warranty deed. Clerk's Papers (CP) 85–88; *see* Skagit County property map exhibit, reproduced at Joint Appendix 33. This purchase was part of the Tribe's long-term effort to reclaim its ancestral lands for the religious, cultural, and economic benefit of its members, *see* Bruce G. Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* 97–98 (2001): the property is adjacent to other land the Tribe owns,

borders a tribal cemetery, and is where the Tribe buried its members killed by smallpox.

3. Until the early 1980s, the Tribe was landless save for a cemetery held in trust for the Tribe since 1914. *Id.* Congress was particularly concerned about landless tribes when, in 1934, it enacted the Indian Reorganization Act, authorizing acquisition of trust land for Indian tribes. 25 U.S.C. § 5108 (2017); H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934). The statute's "intent and purpose" was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73rd Cong., 2d Sess., at 6 (1934)). "Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities." *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798 (8th Cir. 2005) (citations omitted).

4. The Tribe has secured approximately 500 acres (0.78 square miles) of trust land in the past. *See generally* Miller, *The Problem of Justice* at 98–99. The property at issue here is one of the last remaining pieces of that contiguous area. Because the land borders existing Tribe trust land, it is much more likely that the federal government will approve taking the land into trust. *See* 25 C.F.R. §§ 151.10–.11 (2018). Beyond the significant historical, religious, and cultural meaning this land holds for the Tribe, its acquisition for commercial development to support the Tribe's "economic base and its ability to

be self-sufficient[,] . . . to facilitate growth in tribal industry[,] and [to] ensure the use of the land for future generations" is encouraged by federal law. *U.S. Dep't of Interior*, 423 F.3d at 801.

5. There are two partially overgrown fences on the property, one of which, on the southern part, is relevant here. CP 8, 103–05, 115. Both fences are of the same vintage and are believed to have been installed by a prior owner of the property. CP 103–05. The southern fence runs north of and almost parallel to the southern deed line, and has a wide access gate. CP 103, 115; *see* fence line exhibit, reproduced at Joint Appendix 38, and access gate exhibit, reproduced at Joint Appendix 42. One of the previous property owners stated that he was not aware of the southern fence and that neither he nor his family members were told that anyone had built a fence there or intended to do so. CP 57–58.

6. Sharline and Ray Lundgren are the record owners of property immediately south of the subject property. CP 103, 115.

7. In March 2015, the Lundgrens filed a quiet title action in state court, naming the Tribe as the defendant, and alleging that they had acquired title to the property between the southern fence and the boundary line by adverse possession prior to the

Tribe's purchase.[1] CP 7–12; *Lundgren*, 389 P.3d at 571.

8. The Tribe entered a special appearance stating that it was not waiving its sovereign immunity, and filed a motion to dismiss the Lundgrens' complaint or, if denied, to stay proceedings while the Tribe sought appellate review. CP 256, 229–44. The trial court denied the Tribe's motion and shortly thereafter granted the Lundgrens' motion for summary judgment. CP 155–60. The Washington Supreme Court granted the Tribe's request for direct review of those decisions. *Lundgren*, 389 P.3d at 572; *see also* CP 141–43, 148–51.

9. In a 5-4 decision, the Washington Supreme Court affirmed, holding that the Tribe's sovereign immunity did not bar suit. *Lundgren*, 389 P.3d at 572–74. To reach this conclusion, the court construed *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), to support the proposition that courts may exercise *in rem* jurisdiction over property owned by a federally recognized Indian tribe despite its sovereign immunity from suit. 389 P.3d at 573. The court also looked to Washington State precedent interpreting *County of Yakima*, reasoning that an action to quiet title to Indian property is not impermissibly offensive

[1] Washington State law requires quiet title actions "to be brought against the tenant in possession [or] if there is no such tenant, then against the person claiming the title or some interest therein." Wash. Rev. Code § 7.28.010 (2017).

to tribal sovereignty because it is a "'less intrusive assertion of state jurisdiction' . . . than taxing and foreclosing" on Indian land. 389 P.3d at 573 (quoting *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 384–85 (Wash. 1996)). The court further reasoned that the exercise of *in rem* jurisdiction over such land is consistent with tribal sovereign immunity because it does not have "the potential to deprive any party of land [it] rightfully own[s]." 389 P.3d at 573–74 (quoting *Smale v. Noretep*, 208 P.3d 1180, 1184 (Wash. Ct. App. 2009)). Having concluded that tribal sovereign immunity was not a bar to the exercise of *in rem* jurisdiction affecting the Tribe's real property rights, the court held that the Tribe was not a necessary party under Washington Civil Rule 19. The court concluded that the Lundgrens would prevail on their adverse possession claim and, accordingly, the Tribe had no protectable interest at stake—though it acknowledged that "this analysis seems, in a way, to put 'the cart before the horse.'" 389 P.3d at 574–75.

10. Justice Stephens, joined by Chief Justice Fairhurst and Justices Madsen and Gordon McCloud, dissented. The dissenters found that the majority had given "insufficient weight to the sovereign status of the Tribe and erroneously reach[ed] and discount[ed] the merits of [the Tribe's] claims." *Id.* at 577 (Stephens, J., dissenting) (citation omitted) (internal quotation marks omitted). The dissent stated it would have held that the Tribe was a necessary and indispensable party that could not be joined in the quiet title action, necessitating dismissal of the case. *Id.* The dissent noted that the Washington Supreme

Court's opinion in *Anderson & Middleton Lumber Co.*, 929 P.2d 379, which informed the majority's holding in this case, may "rest[] on a misreading of *County of Yakima*," that "will certainly need to be addressed in a future case that considers the arc of United States Supreme Court precedent leading to *Bay Mills*." *Id.* at 578 n.1.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. As "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), Indian tribes enjoy sovereign immunity from suit, subject only to waiver by the tribes or unequivocal abrogation by Congress, *Bay Mills*, 134 S. Ct. at 2030–31.

Contrary to this settled rule of sovereign immunity, the Washington Supreme Court held the Lundgrens' quiet title action could proceed because it was an *in rem* action. *Lundgren*, 389 P.3d at 574. This ruling would create a third exception to tribal sovereign immunity for *in rem* actions. *Id.* The Washington Supreme Court cannot create such an exception. "[T]ribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Bay Mills*, 134 S. Ct. at 2031 (citation omitted).

The Washington Supreme Court is not alone in its belief that there is a third exception to tribal sovereign immunity for actions *in rem*, but the

majority of courts faced with the question have declined to recognize such an exception.

II. The Washington Supreme Court's decision was based on multiple errors: (a) an erroneous interpretation of this Court's decision in *County of Yakima*, 502 U.S. 251; (b) a flawed reading of how tribal sovereign immunity may be limited; (c) a failure to appreciate that one purpose of sovereign immunity is to shield sovereigns from the burdens of litigation; and (d) a failure to recognize the significant sovereign interests in ownership and control of land.

A. The Washington Supreme Court cited this Court's decision in *County of Yakima* in support of its holding. *Lundgren*, 389 P.3d at 573. But this Court did not recognize an *in rem* exception to tribal sovereign immunity in *County of Yakima*. That case held that only Congress may authorize states to impose taxes on fee land within the exterior boundaries of a tribe's reservation. *See County of Yakima*, 502 U.S. at 258. The Court's passing mention of *in rem* jurisdiction in *County of Yakima* did not remotely suggest, much less hold, that there is an exception to tribal sovereign immunity to suit for *in rem* actions. *Id.* at 254–65.

B. The Washington Supreme Court opined that exercising *in rem* jurisdiction over property owned by an Indian tribe is less invasive of tribal sovereignty than other assertions of state jurisdiction that this Court has permitted such as taxing property owned by an Indian tribe. *Lundgren*, 389 P.3d at 573. But the degree to which a tribe's sovereignty is

invaded is not a basis for expanding exceptions to immunity. Only an Indian tribe (by waiver) or Congress (by legislation) may limit tribal sovereign immunity. *See Bay Mills*, 134 S. Ct. at 2030–31. The Upper Skagit Indian Tribe has not waived its immunity to quiet title actions nor has Congress abrogated it.

C. The Washington Supreme Court concluded that subjecting property owned by an Indian tribe to *in rem* quiet title actions would not actually diminish tribal sovereignty because such actions merely apportion property according to all parties' legal rights: *i.e.*, the Tribe would not lose anything to which it was entitled. *Lundgren*, 389 P.3d at 573–74. But the shield of sovereign immunity protects against the burdens of litigation regardless of the merits of a claim. *See Koehler v. United States*, 153 F.3d 263, 267 (5th Cir. 1998); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990). The Tribe may not be subjected to an action that tests its title to the disputed property because being forced to defend its title is a central harm foreclosed by the immunity. The argument that immunity from suit vanishes if the party asserting it will lose on the merits would eradicate immunity from suit.

D. The Washington Supreme Court failed to recognize that a sovereign's interest in real property goes to the heart of the interests protected by immunity, *see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281–82 (1997), and that Indian tribes' interest in real property is a core interest.

III. Tribal sovereign immunity mandates dismissal of *in rem* actions involving tribal property. The Washington Supreme Court erred when it allowed adjudication of the Tribe's real property interests absent jurisdiction over the Tribe based on its ruling that the Tribe was not a necessary party for purposes of Washington Civil Rule 19. *Lundgren*, 389 P.3d at 572, 574–76. Regardless of the merits of the Washington Supreme Court's interpretation of Washington State law, it cannot apply that law in a way that undermines the federal law of tribal sovereign immunity. U.S. Const. art. VI, cl. 2. The Washington Supreme Court erred by permitting the Lundgrens' quiet title action to proceed in the face of the Tribe's sovereign immunity.

IV. Sovereign immunity is not defeated by a lack of alternative remedies for affected litigants, particularly in light of the right to seek remedial legislation from Congress, *see Okla. Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991) (citations omitted), but the Lundgrens were not without other means to protect their interests. The Lundgrens could have sought, but did not seek, to quiet title to the disputed property in the decades before the Tribe purchased the land in 2013. Even now, the Lundgrens could sue the seller of the property for purporting to sell land the seller (the Lundgrens' claim) did not own. The Washington State legislature could create a cause of action for money damages against those who purport to sell real property to which they do not have title. Finally, if the situation presented by this case merited legislative attention, Congress could fashion a

carefully tailored exception to sovereign immunity that would not require a wholesale exception for all actions brought *in rem*.

ARGUMENT

I. Federal Courts and Congress Have Long Recognized That Indian Tribes Retain Inherent Sovereign Immunity.

Tribal sovereignty predates the nation's founding. This Court has recognized that Indian tribes are "distinct, independent political communities," *Worcester v. Georgia*, 31 U.S. 515, 519 (1832), *abrogated on other grounds by Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001), and "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). *See also Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (recognizing Indian tribes as "domestic dependent nations"); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994) ("The Tribe's retained sovereignty predates federal recognition—indeed, it predates the birth of the Republic." (citation omitted)). Because of their recognized status as separate sovereigns, the Constitution's Commerce Clause groups "Indian Tribes" alongside "foreign Nations" and "the several States." U.S. Const. art. I, § 8, cl. 3.

Sovereign immunity from suit is a "core aspect[] of sovereignty that tribes possess," *Bay Mills*, 134 S. Ct. at 2030 (citation omitted), and "a necessary corollary to Indian sovereignty and self-governance," *Three*

Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890 (1986) (citation omitted). *Cf.* The Federalist No. 81 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*").

Thus, "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (citation omitted). For over one hundred years, federal courts have recognized that only Congress (by abrogation) and the tribes (by waiver) may define the contours of tribal sovereign immunity. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2030 ("tribes possess—subject . . . to congressional action . . . the 'common-law immunity from suit traditionally enjoyed by sovereign powers'" (citations omitted)); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512–13 (1940) ("Indian Nations are exempt from suit without Congressional authorization." (citations omitted)); *Adams v. Murphy*, 165 F. 304, 308 (8th Cir. 1908) ("Indian tribes are exempt from civil suit. That has been the settled doctrine of the government from the beginning."); *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 375 (8th Cir. 1895) ("It has been the policy of the United States to place and maintain the . . . civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual.").

"Congress has consistently reiterated its approval of the immunity doctrine." *Okla. Tax Comm'n*, 498 U.S. at 510 (citations omitted). Congressional acts approving tribal sovereign immunity "reflect Congress' desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development." *Id.* (citation omitted) (internal quotation marks omitted). The corollary is that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government," and will find that Congress has abrogated immunity only if the "congressional decision" is "clear" and expressed "unequivocally." *Bay Mills*, 134 S. Ct. at 2031–32 (citations omitted) (internal quotation marks omitted).

The Washington Supreme Court's creation of a new exception to tribal sovereign immunity violated the basic principle that "tribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756).

II. The Washington Supreme Court Erred in Recognizing an *in rem* Exception to Tribal Sovereign Immunity.

This Court has recognized only two exceptions to Tribal sovereign immunity: waiver and congressional abrogation. *Id.* at 2030–31. Here, the Tribe did not waive its immunity and Congress has not limited it.

The Washington Supreme Court held that the exercise of *in rem* jurisdiction to adjudicate ownership of property purchased by an Indian tribe was a third exception to Tribal sovereign immunity. *Lundgren*, 389 P.3d at 574 ("courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted"). The court based this holding on a misreading of *County of Yakima*, 502 U.S. at 255. This ruling is contrary to federal law.

A. This Court's Decision in *County of Yakima* Did Not Recognize an *in rem* Exception to Tribal Sovereign Immunity from Suit.

The Washington Supreme Court misunderstood this Court's holdings in *County of Yakima* and a prior case, *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). Neither case concerns sovereign immunity from suit, let alone supports an *in rem* exception to such immunity. Instead, both cases focus on tribal immunity from taxation and conclude that only Congress can authorize state taxation of reservation lands and Indians. *See County of Yakima*, 502 U.S. at 258 ("'[A]bsent cession of jurisdiction or other federal statutes permitting it' . . . a State is without power to tax reservation lands and reservation Indians." (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973))); *Moe*, 425 U.S. at 465, 475–76 (state taxation of Indian reservation lands or income "'is not permissible absent congressional consent'" (quoting *Mescalero Apache Tribe*, 411 U.S. at 148)). Tribal immunity from taxation and tribal immunity from suit are

distinct concepts, but under both doctrines, only Congress can limit a tribe's sovereignty and authorize the state action at issue. *See Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149, 156–59 (2d. Cir. 2010), *vacated and remanded on other grounds*, 562 U.S. 42 (2011).

In both *County of Yakima* and *Moe*, states argued that Congress had authorized a tax in the General Allotment Act of 1887 (GAA). *County of Yakima*, 502 U.S. at 258; *Moe*, 425 U.S. at 477. In *Moe*, the Court found that Congress had not authorized states to impose sales and property tax on Indians living and working on Indian reservations. 425 U.S. at 477–81. In *County of Yakima*, the Court found that Congress had authorized states "to impose . . . ad valorem property tax[es] on reservation land patented in fee." 502 U.S. at 270. Both cases required the Court to analyze the statutes at issue to determine whether Congress had clearly authorized states to impose a tax. Neither case recognized or even discussed an independent *in rem* exception to tribal sovereign immunity from suit.

The Washington Supreme Court's error arises from a passing reference to *in rem* jurisdiction in *County of Yakima* when the Court explained its justification for the differing applications of the GAA in that case and in *Moe*. *See County of Yakima*, 502 U.S. at 264–65 ("But because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned.").

In *Moe*, the State of Montana imposed and sought to enforce certain sales and property taxes on members of Indian tribes residing or conducting business on reservation land. 425 U.S. at 465, 468–69. At issue was Section 6 of the GAA, which provides,

> [a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.

Id. at 477 (quoting 25 U.S.C. § 349). The Court rejected the State's view that this statute was an express authorization for the disputed taxes, saying, among other things, that such a reading would create "an impractical pattern of checkerboard jurisdiction . . . contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction." *Id.* at 478 (citations omitted) (internal quotation marks omitted). The Court held, as it has in many other cases, that tribal sovereignty prohibits states from imposing taxes on Indian reservation lands or income absent clear authorization from Congress. *Id.* at 475–76.

This principle was also applied in *County of Yakima* with a different result—because the Court found that Congress had clearly acted to allow a specific tax, not on individual Indians as in *Moe*, but on certain Indian-owned land. 502 U.S. at 264–65.

Referring to *Moe*'s "checkerboard jurisdiction" language, the Court distinguished the earlier case by saying, "because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned." *Id.* at 265. An *in rem* tax on land often produces a "checkerboard" effect, but a "checkerboard" pattern of taxation of land, unlike the taxation of persons in *Moe*, was unobjectionable because it was consistent with congressional intent to limit tribal immunity from taxation. *Id.* at 262–65.

Thus, the use of the words "*in rem*" in *County of Yakima* does not remotely suggest the existence of the *in rem* exception to sovereign immunity from suit that the Washington Supreme Court embraced here. Rather, *County of Yakima* merely clarifies the jurisdiction to tax afforded to states pursuant to Section 6 of the GAA. *County of Yakima*, like *Moe* and every other relevant authority, recognized the need for unequivocal congressional action to overcome tribal sovereign immunity from taxation.

Nearly all courts that have considered the question have rejected the Washington Supreme Court's reading of *County of Yakima*. *E.g.*, *Cayuga Indian Nation of New York v. Seneca County*, 761 F.3d 218, 221 (2d Cir. 2014) ("we read no implied abrogation of tribal sovereign immunity from suit into" *County of Yakima*), *aff'g* 890 F. Supp. 2d 240, 247 (W.D.N.Y. 2012) ("[T]he Court disagrees that [*County of Yakima*] stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings."), *aff'd*,; *Hamaatsa, Inc. v. Pueblo of San Felipe*, 388 P.3d 977, 985 (N.M. 2016) (*County*

of Yakima "concerned the county's authority to tax certain fee patent parcels of land, located within the Yakima Reservation—and not . . . the tribe's amenability to suit in court based on a concept of an *in rem* exception to immunity" (citation omitted) (internal quotation marks omitted)); *Wis. Dep't of Nat. Res. v. Timber & Wood Prods. Located in Sawyer Cty.*, Appeal No. 2017AP181, 2017 WL 6502934, at *9 (Wis. Ct. App. Dec. 19, 2017) (publ'n decision pending) ("*Yakima* does not stand[] for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings." (alteration in original) (citation omitted) (internal quotation marks omitted); *Save the Valley, LLC v. Santa Ynez Band of Chumash Indians*, No. CV 15-02463-RGK (MANx), 2015 WL 12552060, at *3 (C.D. Cal. July 2, 2015) ("Plaintiff has failed to provide any binding authority to show that Congress abrogated the Tribe's immunity to in rem actions . . . . Unlike the present action, *Yakima* concerned an action by the local government pursuant to an *express abrogation* of tribal power by an act of Congress."); *First Bank & Tr. v. Maynahonah*, 313 P.3d 1044, 1056 (Okla. Civ. App. 2013) ("We do not agree with [the] assertion that *Yakima* . . . [is] authority that 'plainly demonstrate[s] that tribal sovereign immunity does not bar the exercise of *in rem* jurisdiction over tribal property, even when a tribe loses some part of that property as a result.'" (citation omitted)); *see also Oneida Indian Nation of New York v. Madison County*, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005) ("The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property."), *aff'd in part, vacated in part, rev'd in part*, 665 F.3d

408 (2d Cir. 2011). *Contra Cass Cty. Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 643 N.W. 2d 685, 690–94 (N.D. 2002).

The majority position that there is no general *in rem* exception to tribal sovereign immunity from suit is consistent with settled federal law that there is no general *in rem* exception to state and federal sovereign immunity from suit. *See, e.g., United States v. Nordic Vill., Inc.*, 503 U.S. 30, 38 (1992) ("we have never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and have suggested that no such exception exists" (citation omitted)); *Zych v. Wrecked Vessel Believed to Be the Lady Elgin*, 960 F.2d 665, 669 (7th Cir. 1992) ("there is no general *in rem* exception to principles of sovereign immunity" (citation omitted)); *TransAmerica Assurance Corp. v. United States*, 423 F. Supp. 2d 691, 696 (W.D. Ky. 2006) ("[T]here is no general 'in rem' exception to the doctrine of sovereign immunity. Rather, the Supreme Court has excepted only two very specific types of *in rem* proceedings from sovereign immunity analysis: bankruptcy proceedings, and admiralty cases."). There is no reason to conclude there is a general *in rem* exception to tribal sovereign immunity but no general *in rem* exception to state or federal sovereign immunity.

It is no answer to say that sovereign immunity is not at issue because an *in rem* action "subject[s]" a tribe's *property*, rather than the *tribe itself*, "to suit." *Cf. Kiowa*, 523 U.S. at 754 ("an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity" (citations

omitted)). As this Court has previously recognized, "[t]he phrase, 'judicial jurisdiction over a thing', is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (alteration in original) (quoting Restatement (Second) of Conflict of Laws § 56, Introductory Note (1971)).

For purposes of sovereign immunity from suit, an assertion of jurisdiction over a sovereign's real property is an assertion of jurisdiction over the sovereign itself. *See United States v. Alabama*, 313 U.S. 274, 282 (1941) ("A proceeding against property in which the United States has an interest is a suit against the United States." (citation omitted)); *Stanley v. Schwalby*, 162 U.S. 255, 269–70 (1896) ("It is a fundamental principle of public law . . . that no suit can be maintained against the United States, or against their property, in any court, without express authority of congress." (citation omitted)); *Belknap v. Schild*, 161 U.S. 10, 16 (1896) ("The United States, however, like all sovereigns, cannot be impleaded in judicial tribunal, except so far as they have consented to be sued. . . . The same exemption from judicial process extends to the property of the United States . . . ."); *Carr v. United States*, 98 U.S. 433, 437–38 (1878) ("[W]ithout an act of Congress no direct proceeding can be instituted against the government or its property. . . . Otherwise, the government could always be compelled to come into court and litigate with private parties in defence of its property."); *The Siren*, 74 U.S. 152, 154 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property."); *Cayuga*, 761

F.3d at 221 ("[W]e decline to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings . . . ."). Accordingly, "an action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982) (plurality opinion). Any other rule would allow sovereign immunity from suit to "easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*." *Id.*

No matter the form of action, adjudicating a non-consenting sovereign's real property rights requires an effective assertion of jurisdiction over the sovereign itself and necessarily implicates sovereign immunity from suit. Absent a valid exception to immunity, the action cannot proceed. This Court's decision in *County of Yakima* does not support the Washington Supreme Court's recognition of an *in rem* exception to tribal sovereign immunity absent clear congressional action authorizing such an exception.

B. Only Congress or an Indian Tribe May Limit a Tribe's Sovereign Immunity.

The Washington Supreme Court sought to buttress its conclusion that there is an *in rem* exception to sovereign immunity by opining that an action to quiet title to Indian land intrudes less on the tribe's sovereignty than other assertions of state jurisdiction that this Court has permitted, such as the taxation and foreclosure of fee lands permitted in

County of Yakima. *Lundgren*, 389 P.3d at 573. The court did not explain why *taking* ancestral land of which a tribe is a record owner is less "intrusive" than *taxing* it. But the question is irrelevant. Whether an exception to tribal sovereign immunity exists has nothing to do with how intrusive it is. The issue is authorization, which may be granted only through clear congressional action or tribal waiver. *See Bay Mills*, 134 S. Ct. at 2030–31 ("[W]e have time and again treated the doctrine of tribal immunity [as] settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver)." (citation omitted) (internal quotation marks omitted)).

The scope of the limitation on tribal sovereign immunity from a legitimate source (Congress or a tribe) is as broad as the source provides. *See Okla. Tax Comm'n*, 498 U.S. at 510 ("Congress has always been at liberty to dispense with such tribal immunity or to limit it."). But if the limitation comes from an illegitimate source, it is invalid no matter its scope. *See Bay Mills*, 134 S. Ct. at 2030–31. In this case, neither the Upper Skagit Indian Tribe nor Congress authorized state courts to exercise *in rem* jurisdiction over the Tribe's land in quiet title actions. Accordingly, the Tribe remains immune from suit to quiet title to its land.

C. A State's Exercise of *in rem* Jurisdiction over Property Acquired by an Indian Tribe Works an Impermissible Diminution of the Tribe's Sovereignty.

The Washington Supreme Court's third justification for the exercise of *in rem* jurisdiction over property purchased by a federally recognized Indian tribe is that, because the action will merely determine the tribe's legal rights, it does not actually burden or invade tribal sovereignty. According to the court, "a state court in rem action . . . does nothing more than divide [land] among its legal owners according to their relative interests," and does not have "the potential to deprive any party of land [it] rightfully own[s]." *Lundgren*, 389 P.3d at 573–74 (citations omitted).

In other words, the Washington court asks, "What do you need sovereign immunity for? If you are right, you will win the case." Of course, the same can be said of any legal action against an Indian tribe or any other sovereign. Apart from the logical fallacy of looking to the outcome of the case to decide whether the case can be brought—what the state court itself called putting "the cart before the horse," 389 P.3d at 575—this reasoning overlooks the fundamental reason why sovereigns are immune from suit.

Sovereign immunity protects sovereigns from the burdens of litigation in the interest of preserving sovereign dignity, *Alden v. Maine*, 527 U.S. 706, 715, 749 (1999), protecting public resources, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), and maintaining self-governance, *Ex parte Ayers*, 123

U.S. 443, 505 (1887). Immunity would be eviscerated if the action had to be heard on the merits to determine if immunity existed, and immunity limited to suits without merit would be no immunity at all. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."); *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989) ("[W]e must first determine whether the Band has effectively waived tribal immunity—thus making it amenable to suit in federal court—irrespective of the merits of [plaintiff's] tort and contractual claims."); *Koehler*, 153 F.3d at 267 ("At its core, sovereign immunity deprives the courts of jurisdiction irrespective of the merits of the underlying claim."); *Foremost-McKesson, Inc.*, 905 F.2d at 443 ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits" (citation omitted)).

The Tribe is the record owner of this property, and its title may not be tested without its consent or congressional authorization.

D. All Sovereigns, and Particularly Indian Tribes, Have Interests in Ownership and Control of Their Land Protected by Sovereign Immunity.

The assertion of *in rem* jurisdiction over land poses a significant threat to sovereign interests. Accordingly, state sovereign immunity bars actions targeting state real property interests. *See, e.g.*, *California v. Deep Sea Research, Inc.*, 523 U.S. 491,

506 (1998) ("the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests");[2] *Coeur d'Alene Tribe*, 521 U.S. at 289 (O'Connor, J., concurring in part and concurring in the judgment) ("The Tribe could not maintain a quiet title action in federal court without the State's consent, and for good reason: A federal court cannot summon a State before it in a private action seeking to divest the State of a property interest." (citations omitted)). The federal government has a similar interest in protecting federal land. While the United States has waived its sovereign immunity to some quiet title actions, it has retained its immunity to adverse possession claims, *see* 28 U.S.C. § 2409a(a), (n) (2017).

In *Coeur d'Alene Tribe*, the Coeur d'Alene Tribe sued state officials seeking a "permanent injunction prohibiting [the officials] from regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in the submerged lands" of

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[2] *Deep Sea Research* held that an *in rem* admiralty action could proceed against a *res* not in the State's possession. *Id.* at 507–08. The Court explicitly acknowledged the limited applicability of this carve-out, which is rooted in admiralty law. *Id.* (holding that the "longstanding precedent respecting the federal courts' assumption of in rem admiralty jurisdiction over vessels that are not in the possession of a sovereign" meant "that the Eleventh Amendment does not bar" *in rem* jurisdiction over a shipwrecked vessel); *see also Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 461 (2004) (Thomas, J., dissenting) ("our holding in *Deep Sea Research* was limited to actions where the res is not within the State's possession"). It has no applicability to real property of which the sovereign has recorded title.

Lake Coeur d'Alene based on a prior executive order. 521 U.S. at 264–65. The Court noted that while "[a]n allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the [*Ex parte*] *Young* fiction," and thereby avoid the state's sovereign immunity defense, "this case is unusual in that the Tribe's suit is the functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281. *See generally Ex parte Young*, 209 U.S. 123 (1908). If the Tribe prevailed, "substantially all benefits of ownership and control would shift from the State to the Tribe," and the state's "sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 281–82, 287.

While the Court's decision was grounded in state immunity under the Eleventh Amendment, *id.* at 287–88, its reasoning is equally applicable to tribal sovereign immunity. The Court has

> sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the

> ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 713. Just as the State's immunity from suit in *Coeur d'Alene Tribe* was based on the State's inherent sovereignty, Indian tribes' immunity from suit is derived from their inherent sovereignty. *See Bay Mills*, 134 S. Ct. at 2030–31 (citations omitted). While the doctrines of tribal sovereign immunity and state sovereign immunity are not identical,[3] their historical origins and justification are similar. There is no principled basis to distinguish between the two immunities with respect to sovereign interests in land. Whether the sovereign is a state or an Indian tribe, suits seeking title to, or functional control over, sovereign land implicate sovereign interests and are subject to sovereign immunity.

The plaintiffs in *Coeur d'Alene Tribe* and in this matter both brought suits directly implicating sovereign interests and both claimed an exception to sovereign immunity. In *Coeur d'Alene Tribe*, the exception was the *Ex parte Young* doctrine: a suit seeking prospective relief from state officials, rather than the state itself. 521 U.S. at 266. The Court rejected application of the *Ex parte Young* exception

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[3] For example, states mutually surrendered their sovereign immunity from suits filed by each other at the Constitutional Convention, but Indian tribes and states made no such mutual concession. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

because the relief sought against state officials implicated sovereign interests in the ownership and control of land. *Id.* at 281–82, 287–88. Similarly, in this matter, the Lundgrens seek an exception to the Upper Skagit Indian Tribe's sovereign immunity by bringing an *in rem* action to quiet title to disputed property. The Court should reject this exception for the same reason it did in *Coeur d'Alene Tribe*: despite the form of the suit, the substance of the suit implicates sovereign interests in the ownership and control of land.

Moreover, Indian tribes have an acute interest in maintaining ownership and control of their land, especially in light of the history of such land being taken from tribes, often with the very purpose of undermining tribal sovereignty. *See, e.g., County of Yakima*, 502 U.S. at 254 ("The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.").[4]

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[4] The Tribe purchased the land at issue with the intention of taking the land into trust pursuant to 25 C.F.R. §§ 151.10–.11. *See infra* at 6, paras. 3–4. As part of this process, the Tribe must provide the Department of the Interior with title insurance for the relevant property. In the Tribe's experience, all title insurance policies contain an exception for claims such as adverse possession, to which the Department of the Interior has not previously objected. If the Tribe prevails here, it expects to be able to take the land into trust based on this past experience and on the effect of a favorable ruling for the tribe: *i.e.*, such a ruling would effectively extinguish the Lundgrens' adverse possession claim and clarify that sovereign immunity would bar other adverse possession claims.

III. Once a Tribe Invokes Sovereign Immunity from Suit, Courts May Not Adjudicate Tribal Rights and Interests in the Absence of the Tribe.

The Washington Supreme Court recognized that the Upper Skagit Indian Tribe could not be joined in the Lundgrens' quiet title action against its will. *Lundgren*, 389 P.3d at 572. But, having concluded that the court had *in rem* jurisdiction over the disputed property, the court then held that the Tribe was not a necessary party under Washington Civil Rule 19. *Id.* at 574–76. The court based this holding on its finding that the Tribe had no legally protected interest at stake, a finding it made by analyzing the merits of the dispute and determining the Lundgrens had a superior claim to the disputed property via adverse possession. *Id.* at 575–76. As the majority below conceded, this analysis put "the cart before the horse." *Id.* at 575. In fact, there is no horse. The court lacked the power to proceed.

Before a court can resolve the merits of a dispute, it must have jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (citation omitted)). Sovereign immunity from suit deprives courts of jurisdiction. *See Meyer*, 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature."); *Alvarado v. Table*

Mountain Rancheria, 509 F.3d 1008, 1015–16 (9th Cir. 2007) ("tribal immunity precludes subject matter jurisdiction in an action against an Indian tribe"). Accordingly, once a tribe invokes its sovereign immunity from suit and deprives the court of jurisdiction, the suit must be dismissed.

Sovereign immunity from suit would be effectively eradicated under the Washington Supreme Court's reasoning. Immunity could be avoided by simply dismissing the sovereign from the case or omitting to join the sovereign while adjudicating the sovereign's rights in its absence. Jurisdiction is a prerequisite to a determination on the merits, not the other way around.

The Washington Supreme Court is the final authority on Washington State law, including Washington Civil Rule 19, but it may not invoke state rules governing joinder of parties in a way that defeats sovereign immunity in violation of federal law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

"[T]ribal immunity 'is a matter of federal law and is not subject to diminution by the States.'" *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756). When a sovereign Indian tribe's legal rights are directly implicated in an action and the tribe invokes its immunity from suit, it does not matter whether the action is *in personam* or *in rem*. The action cannot proceed without the tribe's consent or clear congressional abrogation of the tribe's immunity from suit.

This Court confronted a similar issue in *Republic of the Philippines v. Pimentel*, 553 U.S. 851 (2008). That case arose from an interpleader action to resolve disputed ownership of property. *Id.* at 854–55. The Republic of the Philippines was named in the suit, invoked its sovereign immunity, and sought dismissal of the action. *Id.* at 855, 859. The District Court dismissed the foreign sovereign, but permitted the action to proceed to judgment in its absence. *Id.* at 860. The Court of Appeals subsequently held that while the Republic of the Philippines was a required or necessary party, its claim was so unlikely to prevail on the merits that the action could proceed in its absence. *Id.* This Court reversed, finding that the lower courts had not given "full effect to sovereign immunity." *Id.* at 865. The Court held:

> A case may not proceed when a required-entity sovereign is not amenable to suit. . . . [W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where

> there is a potential for injury to the interests of the absent sovereign.

Id. at 867. The analysis is no different here. The Lundgrens filed an *in rem* action to resolve disputed ownership of property and named the Tribe as a defendant. The Tribe invoked its sovereign immunity from suit, sought dismissal of the action, is the record owner of the disputed land, and disputes the validity of the Lundgrens' adverse possession claim on the merits. To "give full effect to" the Tribe's "sovereign immunity" from suit, *Pimentel*, 553 U.S. at 865, the Lundgrens' quiet title action must be dismissed.

IV. The Lundgrens Had and Continue to Have a Means to Seek Redress for Their Claim.

This Court has accepted that tribal sovereign immunity may leave a litigant without a remedy short of congressional action. *Okla. Tax Comm'n*, 498 U.S. at 514 (plaintiffs "may of course seek appropriate legislation from Congress"); *see Kiowa*, 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); *cf. Pimentel*, 553 U.S. at 872 ("Dismissal . . . will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims. But that result is contemplated under the doctrine of foreign sovereign immunity.").

But, here, the Lundgrens *did* have a remedy; they chose not to exercise it. They claimed below to have

"acquired title by adverse possession decades before" the Tribe purchased the property in 2013. Brief for Respondent at 1, *Upper Skagit Indian Tribe v. Lundgren*, No. 91622-5 (Wash. Nov. 2, 2015), 2015 WL 10438674, at *1. Indeed, they argued that between 1947 and 2013, either they or their predecessors had continually used the property in the manner required to obtain title by adverse possession. *Id.* at *7–18. For fifty-six years, they elected to do nothing to confirm their title. *See Halverson v. City of Bellevue*, 704 P.2d 1232, 1234 (Wash. Ct. App. 1985) ("the merit of an adverse possession claim cannot be determined . . . prior to adjudication").

Even now, they have a remedy. Washington law recognizes a claim for money had and received and a claim for unjust enrichment, either of which the Lundgrens could bring against the seller of the property who, they claim, sold the property without the right to do so. *See Coast Trading Co., Inc. v. Parmac, Inc.*, 587 P.2d 1071, 1075 (Wash. Ct. App. 1978) (noting that an action for "money had and received . . . is looked upon with favor by the courts and is liberally applied" (citation omitted)); *Young v. Young*, 191 P.3d 1258, 1262 (Wash. 2008) ("Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." (citation omitted)). The Washington State legislature also could address the Lundgrens' situation by creating a specific cause of action for money damages against those who, without valid title, purport to dispose of property.

Finally, the Lundgrens "may of course seek appropriate legislation from Congress." *Okla. Tax Comm'n*, 498 U.S. at 514. This Court has repeatedly acknowledged that it would be improper for the federal courts to judicially abrogate tribal sovereign immunity. *See Bay Mills*, 134 S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." (citations omitted)); *Kiowa*, 523 U.S. at 759–60 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. . . . [W]e decline to revisit our case law and choose to defer to Congress."); *Okla. Tax Comm'n*, 498 U.S. at 510 ("Congress has always been at liberty to dispense with . . . tribal immunity or to limit it . . . [and] has consistently reiterated its approval of the immunity doctrine . . . . [W]e are not disposed to modify the long-established principle of tribal sovereign immunity.").

Congress has been active and diligent in carrying out its powers and responsibilities in this area. It has repeatedly considered and enacted various limits on tribal sovereignty:

> Congress has now reflected on *Kiowa* and made an initial (though of course not irrevocable) decision to retain that form of tribal immunity. Following *Kiowa*, Congress considered several bills to substantially modify tribal immunity in the commercial context. Two in particular—drafted by the

> chair of the Senate Appropriations Subcommittee on the Interior—expressly referred to *Kiowa* and broadly abrogated tribal immunity for most torts and breaches of contract. But instead of adopting those reversals of *Kiowa*, Congress chose to enact a far more modest alternative requiring tribes either to disclose or to waive their immunity in contracts needing the Secretary of the Interior's approval. Since then, Congress has continued to exercise its plenary authority over tribal immunity, specifically preserving immunity in some contexts and abrogating it in others.

Bay Mills, 134 S. Ct. at 2038 (citations omitted).

The Lundgrens asserted a claim for relief to which they are not entitled, but they had and have other means of redress: they could have sought to quiet title in the decades prior to the Tribe's purchase or sued the seller for money damages after the Tribe's purchase. If that outcome is unwise or unjust, Congress has the power and institutional resources "to weigh and accommodate the competing policy concerns" and craft a legislative response. *Kiowa*, 523 U.S. at 759. The Lundgrens are not without recourse.

CONCLUSION

The judgment of the Washington Supreme Court should be reversed.

Respectfully submitted,

Arthur W. Harrigan, Jr.
Counsel of Record
Tyler L. Farmer
Kristin E. Ballinger
John C. Burzynski
Harrigan Leyh Farmer &
Thomsen LLP
999 Third Ave., Suite 4400
Seattle, WA 98104
(206) 623-1700
arthurh@harriganleyh.com

David S. Hawkins
General Counsel
Upper Skagit Indian Tribe
25944 Community Pl. Way
Sedro-Woolley, WA 98284
(360) 854-7016
dhawkins@upperskagit.com

Counsel for Petitioner

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